SUPREME COURT.

Synopsis of the Decisions Rendered at the Austin Sitting of the Supreme Court.

Made up From the Full and Official Report of the Rulings and Opinions Rendered.

Compiled for the Gazette.

Pickett, Jr., vs. Mayers, from Wilson county. The appellee in this case files his motion to dismiss this appeal, before the amount involved in the controversy in the court below was but twenty-five dollars, wherefore, the motion alleges, the supreme court is without jurisdiction. But held, that without reference to the amount involved in the controversy, the supreme court has appellate jurisdiction over all appeals from the district court wherein the district court had original jurisdiction. The motion to dismiss the appeal is overruled. So ordered.

Bawser & Lemman vs. Mitchell et al., from Dallas county. Leaving out of view the mortgage which was executed some time after the delivery of the property to the defendants, it will resemble almost exactly the case of Cobb vs. Tafhs, heretofore published in these columns, and republished in the Texas Law Review, No. —. The contracts in the two cases are nearly alike, and are to be considered as conditional sales. In Cobb vs. Tafhs, the property was destroyed by fire after it was delivered to the defendants and suit was brought upon the notes given for the same, and in that case it was held that the plea of failure of consideration was properly sustained. But the appellants insist in this case, that by means of the mortgage, the parties changed the character of the contract, that is, that it became an executory contract and passed title to the appellees. Such doctrine harmonizes with that announced in Griffith vs. Morrison, 58 Texas, 46. But in this case the parties to the mortgage are not the same as the parties to the sale. The note is indorsed in blank by the payees, which is sufficient to account for its possession by the appellants. But, again, the mortgage is executed by only a part of the makers of the note, and, what is more important, it does not mention the note or purport to be given for its security. Moreover, the evidence for the appellants is meager and unsatisfactory. Affirmed.

Gribble et al. vs. Harvey Bros., from Cooke county. Petition alleged that defendants undertook to build a house for a third party and that at their request plaintiffs furnished a part of the material which defendants agreed to furnish. Held, that defendants are liable for the material so furnished, and the petition set up a good cause of action. The petition also alleged that all defendants, including McC., were jointly engaged in building a house for B, seeking now to recover of defendants the value of the material they furnished them for that purpose, the contract made between defendants and B. and the receipts given by McC., which were signed "McC. & Co.," were admissible in evidence. Plaintiffs having no connection with or interest in the contract between defendant and B., can claim nothing under that contract—the sole ground of their claim being that they furnished defendants material to carry out their contract. The evidence shows that the materials were in fact supplied to McC., but he has not appealed, and such being the fact to hold defendants liable as joint contractors with McC., and responsible for his contract, it must appear that appellants were joint contractors with McC., in the sense of partners under the contract with B., and not mere sureties, or, if sureties, that they so acted or permitted McC., to act as to make plaintiff believe them to be partners, and that plaintiffs, acting under such bona fide belief, furnished the materials. The evidence shows clearly that appellants were sureties only and furnished the materials upon McC.'s credit. Revered and remanded.

Bawser & Lemman vs. Mitchel et al., from Dallas county. This case is in every essential a counterpart of the case of Bawser & Lemman vs. Mitchell et al. supra, and presents for our adjudication exactly the same questions of law and fact. The pleadings in both cases are in every respect the same. The facts proved upon the trials are the same. As in the former case the judgment in this case was rendered in favor of the defendants. Upon the doctrines announced in the former appeal the judgment in this case is affirmed. Affirmed.

Terrell vs. Teal et al., from Victoria county. It is a familiar rule of law that notwithstanding the recital in the deed that the purchase money is unpaid, it is nevertheless a deed absolute on its face, if the deed does not in terms reserve the vendor's lien. In such cases the title passes to the grantee, and the vendor's remedy for the purchase money is upon his lien as a moneyed demand, but he holds no title; he has only his equitable remedy to enforce his lien against the vendee, 58 Tex., 387. The deed in this case was of that character, and the effect of the recitals contained in it are not distinguishable from the instance suggested in 58 Tex, 387. And this view is decisive of this appeal, for the probate court possessed no power to decree to the executor of C. authority to make a compromise with S. on the subject involved in the petition of M., the executor, "and if necessary to recovery to the estate of L. S. a portion of the land." See former report of this case, 48 Tex. 509. The judge's findings of law and fact were correct. Affirmed.

Blair vs. McManus, from Nueces county. The truth of facts stated in an officer's return of service, supported by his affidavit, when not controverted, must be assumed as undisputed facts. Defendant being duly served, plaintiff was entitled to take judgment by default for want of answer upon the call of the appearance docket or at any time after appearance day. The notice provided by statute may be served on the defendant by any disinterested person competent to make oath of that fact, and the competency and disinterestedness of such person will be presumed. Defendant was cited to appear on Monday, Dec. 10, 1883; Friday, Dec. 14 consequently was "appearance day." No answer was filed by defendant when judgment by default was asked for, and was rendered nearly three weeks afterwards during the same term of court, which adjourned Jan. 17, 1884. The judgment, prima facie, was regular, and was not affected by answer filed after rendition, unless for causes requiring it to be set aside. It was within the discretion of the trial court to permit the notice to be withdrawn from the record to enable the person who made the return to correct an informality. Arts. 1233 and 1239, R. S., conferred ample authority for the court's action in this case, and service having been actually made on defendant it was not void because of failure to have an affidavit attached to the notice setting forth required facts, and the defendant was bound to take notice of the return that was made and the order of the court allowing notice to be withdrawn. See Freeman on Judg. sec. 126. The affidavits filed do not show that the return was not attached to the notice. But the statute on the subject is directory, and the omission to attach would not, of itself, be ground to set aside the judgment. The return could be amended, 3 Tex. 261. Affidavits showing no irregularity as to time and manner of asking and rendering the judgment by default, it was not error to render it other than appearance day. Affirmed.

Price vs. Chadwick, from Williamson county. This was a question of proper boundaries in an action of trespass to try title. The evidence was sufficient to support the conclusions of the court. The question was the identity of lines and corners of surveys to fix boundaries in dispute, and the relative value of calls, or the superiority to be given one class of calls over another, is not involved. In this case circumstantial evidence had to be resorted to trace the footsteps of the surveyors who made the surveys, and was sufficient to maintain the judgment. 30 Tex. 269; 61 Tex. 612. Judgment rendered on conflicting evidence, to be revisable by the appellate court on account of the evidence, must appear to be without sufficient supporting evidence, or so decidedly against the preponderance of the evidence as to show that the jury did not duly consider it. 61 Tex. 393. Affirmed.

The International & Great Northern Railway vs. Underwood, from Bexar county. The right of a defendant in a damage suit for injuries to have a committee of competent physicians appointed to examine the injured party and testify has been upheld (47 Iowa 375), but will not be recognized unless the motion for said committee shows a necessity for the ends of justice. When the petition claims exemplary damages, and there is a question whether the evidence shows such facts as would sustain such a claim, a charge should be given upon that subject unless in consequence of an oral statement made in open court by the plaintiff or his counsel in court by a charge withdraws such claim entirely from the jury. The issues between the parties are made by the pleadings, and when a claim and issue is thus presented, correct practice requires that, if desired, it must be withdrawn in the same way. Though the injuries in this case were serious, the verdict for $15,000 actual damages was excessive. As to the degree of care incumbent on the appellant, and as to what would constitute negligence, the court charged as follows: It is the duty of the defendant to exercise proper care to transport its passengers safely and the want of such care is deemed in law negligence, for which the defendant is liable. Held, error, because its effect was to make the common carrier an insurer. Reversed and remanded.

Piggott vs. Schramm & Co., from Kinney county. The attachment law authorizes the seizure of so much of the property of the defendant as shall be sufficient to satisfy the demand of the plaintiff and the probable costs of suit. Art. 180 of R. S. provides that if plaintiff recovers in the suit the attachment lien shall be foreclosed as in case of other liens. Art. 181 provides that when personal property has been levied on the judgment shall also be against the defendant and his sureties on his replevy bond for the amount of judgment, interest and costs, or for the value of the property replevied and interest. It is settled that the same rule applicable to mortgage and other like liens applies to the foreclosure of attachment liens, and that the right to decree a foreclosure and sale of the property attached for the interest and costs accruing up to the date of judgment, is clear and unquestionable. If a failing debtor, intending to transfer and assign his property for the benefit of his creditors, has made a valid transfer and assignment to an assignee, or is in the act of doing so, it would be in fraud of the law of assignments to allow a creditor to issue an attachment before it was practicable, perhaps, for the assignee to reach the county clerk's office and cause the deed to be filed for record or be recorded. The act of recording a deed of assignment is not necessary to determine the vitality and power of the deed to invest the assignee with title to the property as against attaching creditors. The object of promptly recording the deed is to give notice of its contents, but as between those who are creditors at the time when the assignment is made, the trust accepted and notoriously acted upon by the assignee, the reversing of it cannot be taken as a test of the efficiency of the deed. On the question of fraudulent intent to defeat, delay or defraud creditors as applied to this case, the cases of Blum and Welborne, 58 Tex., 157, and Keating vs. Vaughan, 61 Tex., 521, are referred to without comment. Reversed and remanded.

Ward vs. Pollock & Gibbs, from San Saba county. It is a settled rule that a proprietor acquires a lien for the rent of his premises for the quarter's rent which may be in the process of becoming due, but he cannot acquire liens for future quarters or periods which have never commenced and may never commence. At all events the appellant's lien in this case did not authorize the issuance of a writ (distress) for more than $147, and that was below the jurisdiction of the district court, wherefore the court did not err in dismissing the writ. 60 Tex., 620. Affirmed.

Burcks vs. Burroughs et al., from Milam county. The effect of the dismissal of an appeal is to have the judgment rendered below in force without change, and without power in the lower court, on the record as it stands, to open the case for the purpose of making any further orders or entries in the cause other than to enforce and give effect to whatever the mandate may have directed. If on appeal the judgment had been affirmed the court below could only have made the orders necessary to carry out the judgment of the appellate court, and in the language of the statute (R. S. 1419) "the cause shall then be dropped from the docket." A fortiori would the same result ensue when the appeal is dismissed at the cost of appellant and his sureties, thus leaving the parties in statu quo. The statute, 1049 R. S., provides in what cases appellate courts shall render judgments on appeal bonds or writ of error bonds. But the judicial system does not contemplate a removal of the jurisdiction of the inferior courts over the cause except to carry out the mandate of the superior courts, except when the judgment below is reversed and even in that case when it can be properly done the superior court will render the judgment which should have been rendered below. In cases where, upon the face of the record, judgment may be rendered against the sureties upon an appeal bond, such judgment must be rendered by the appellate court and not by the court a quo. If in cases where the appellee is entitled to redress or damages for a breach of the conditions of the bond, and his remedy cannot be enforced by the appellate court, he must seek his remedy by suit upon the bond in some appropriate form of action. Affirmed.